

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

MELINDA CROMER,

Plaintiff,

V.

NANCY A. BERRYHILL, Acting  
Commissioner of Social Security,

**Defendant.**

Case No. 2:17-cv-00304-RAJ-TLF

## REPORT AND RECOMMENDATION

Noted for November 24, 2017

This matter is before the Court on defendant's motion to dismiss plaintiff's complaint  
g review of the Commissioner's denial of her application for disability insurance benefits.  
5. This matter has been referred to the undersigned Magistrate Judge. *Mathews, Sec'y of  
V. Weber*, 423 U.S. 261 (1976); 28 U.S.C. § 636(b)(1)(B); Local Rule MJR 4(a)(4). For  
asons set forth below, the undersigned recommends that the Court deny defendant's motion  
miss.

On June 27, 2013, plaintiff filed an application for disability insurance benefits. An administrative law judge (“ALJ”) found that plaintiff was not disabled in a decision dated June 10, 2015. Dkt. 15-1, pp. 5-23. On December 16, 2016, the Appeals Council denied plaintiff’s request for review of that decision, making the ALJ’s decision the final decision of the Commissioner. Dkt. 2-1 at p.1; 20 C.F.R. § 416.1481. On February 24, 2017, plaintiff filed a proposed complaint in this Court seeking review of the Commissioner’s final decision, and the

1 complaint was subsequently filed on February 28, 2017. Dkts. 1-2. Defendant seeks dismissal of  
2 the complaint on the basis that it was untimely filed, and therefore that the Court lacks subject  
3 matter jurisdiction.

4 A challenge to the Court's subject matter jurisdiction is "treated as brought under"  
5 Federal Rule of Civil Procedure (FRCP) 12(b)(1). *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 980  
6 (9th Cir. 2007); *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989). A motion to  
7 dismiss brought under FRCP 12(b)(1) "can attack the substance of a complaint's jurisdictional  
8 allegations despite their formal sufficiency, and in so doing rely on affidavits or any other  
9 evidence properly before the court." *Id.* The party opposing the motion then must "present  
10 affidavits or any other evidence necessary to satisfy its burden of establishing that the court, in  
11 fact, possesses subject matter jurisdiction." *St. Clair*, 880 F.2d at 201.

12 It is not an abuse of the Court's discretion, therefore, to consider such "extra-pleading  
13 material," even when "necessary to resolve factual disputes." *Id.* "[A]ll disputed facts," however,  
14 are to be "resolved in favor of the non-moving party." *Costco v. United States*, 248 F.3d 863,  
15 865-66 (9th Cir. 2001); *see also Murphy v. Schneider National, Inc.*, 362 F.3d 1133, 1139 (9th  
16 Cir. 2004); *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000) (court favorably views facts  
17 alleged to support jurisdiction).

18 A party may obtain judicial review of the Commissioner's final decision by commencing  
19 a civil action in federal court "within sixty days after the mailing to him of notice of such  
20 decision or within such further time as the Secretary may allow."<sup>1</sup> 42 U.S.C. § 405(g); 20 C.F.R.  
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22 <sup>1</sup> Contrary to defendant's asserted basis for seeking dismissal of the complaint, this time limit "is not jurisdictional,  
23 but is instead a statute of limitation which the Secretary may waive." *Banta v. Sullivan*, 925 F.2d 343, 345 (9th Cir.  
24 1991). As such, failure to file within that time limit is an affirmative defense that "is properly raised in a responsive  
25 pleading." *Vernon v. Heckler*, 811 F.2d 1274, 1278 (9th Cir. 1987) (citing FRCP 8(c)). As defendant has raised this  
issue in a motion to dismiss filed in response to the complaint, it is properly raised and the Commissioner is deemed  
not to have waived it.

1 § 404.981 (a claimant may file an action in federal court within 60 days after the date the notice  
2 of the Appeals Council’s action is received). The date notice of the Appeals Council’s decision is  
3 received is “presumed to be 5 days after the date of such notice, unless there is a reasonable  
4 showing to the contrary.” 20 C.F.R. § 422.210(c).

5 As noted above, the Appeals Council issued its denial of plaintiff’s request for review on  
6 December 16, 2016. Plaintiff filed her proposed complaint with the Court on February 24, 2017,  
7 which both parties agree was more than the 65 days of allotted time for seeking judicial review.<sup>2</sup>  
8 However, plaintiff argues she had good cause for filing her complaint late, and asks the Court to  
9 deny defendant’s motion on that basis. She claims she was hindered in her efforts to timely file  
10 her complaint by the fact that: (1) her legal counsel informed her that they would no longer  
11 represent her two weeks after she received the Appeal Council’s notice; (2) her efforts to obtain  
12 new legal counsel to assist in seeking judicial review; and (3) her mental health conditions.

13 The requirement that a claimant seek judicial review of a “final decision” made after a  
14 hearing by filing a civil action in federal court within 60 days of mailing the notice thereof to  
15 him or her, may be waived by the Court. *Johnson v. Shalala*, 2 F.3d 918, 923 (9th Cir. 1993).  
16 The principal of equitable tolling applies to Section 405(g)’s 60-day filing rule. *Bowen v. City of*  
17 *New York*, 476 U.S. 467 480 (1986); *see generally*, 20 C.F.R. §§ 404.911(b), 404.982<sup>3</sup>.  
18 Equitable tolling applies “when the plaintiff is prevented from asserting a claim by wrongful  
19 conduct on the part of the defendant, or when extraordinary circumstances beyond the plaintiff’s  
20 control made it impossible to file a claim on time.” *Stoll v. Runyon*, 165 F.3d 1238, 1242 (9th

21 <sup>2</sup> Plaintiff would have been presumed to receive notice of the Appeals Council’s denial of her request for review on  
December 21, 2016, and the deadline was February 19, 2017 to file her complaint in federal court.

22 <sup>3</sup> Plaintiff relies on the factors and “[e]xamples of circumstances where good cause may exist” set forth in 20 C.F.R.  
§ 404.911 to argue her late filing should be excused. That regulation applies to the deadline for filing a request for  
reconsideration of an initial denial of a benefits application. *Id.* 20 C.F.R. §404.982 allows a party to request an  
extension of the time for filing an action in United States District Court. The party must state good cause for missing  
the deadline, and refers to the criteria listed in 20 C.F.R. §404.911.

1 Cir. 1999). A plaintiff's mental illness or condition should be considered as a legitimate reason  
2 to apply equitable tolling if the mental illness is severe and the mental illness or condition caused  
3 the plaintiff to file in an untimely manner. *See, Zapata v. Astrue*, C08-5670BHS (W.D. Wash.  
4 2009) 2009 WL 1919008 (allowing equitable tolling when a mentally ill claimant failed to file an  
5 appeal on time in a Social Security case); *Forbess v. Franke*, 749 F.3d 837, 840-842 (9th Cir.  
6 2014) (applying equitable tolling and reversing the district court's decision to dismiss under the  
7 one-year statute of limitations, because the petitioner's severe mental illness afflicted him with  
8 delusions, the delusions prevented him from understanding the one-year deadline for filing a  
9 federal habeas corpus petition, and his mental condition caused him to fail to meet the deadline).

10 There is no allegation or evidence of any wrongful conduct on the Commissioner's part  
11 here. However, the Court finds that extraordinary circumstances beyond plaintiff's control made  
12 it impossible for her to file her claim on time. According to the evidence currently before the  
13 Court, plaintiff received the Appeals Council's notice on December 24, 2016, meaning she had  
14 until February 22, 2017, to file her complaint in federal court, just two days prior to when she  
15 actually did so. Dkt. 16 at 4-5 (Declaration of plaintiff's counsel); Dkt. 17, p. 1; Dkt. 17-1; Dkt.  
16 17-2.

17 Sometime during the second week of January 2017, plaintiff was informed by the legal  
18 representative who handled her claim at the administrative review level that they would no  
19 longer be handling her claim. Dkt. 17-2. Plaintiff states she started the process of finding another  
20 legal representative on January 24, 2017, with her sister's help. *Id.* She first consulted with an  
21 attorney on January 31, 2017, and learned on February 6, 2017, that that attorney had declined to  
22 pursue her case. *Id.* A second attorney with whom she consulted on February 9, 2017, declined to  
23 take her case as well, although it is not entirely clear whether that attorney declined to do so on  
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1 that date or sometime later. *Id.*

2       On February 15, 2017, plaintiff wrote to the Appeals Council about her efforts to find  
3 new legal counsel, and explained that her “ability to function daily, and the additional stress  
4 upon receiving [the Appeals Council’s notice and the notice from her legal representative]  
5 deepened [her] symptoms preventing [her] from taking immediate action.” Dkt. 17-2. Plaintiff  
6 told the Appeals Council that her sister was trying to locate an attorney on her behalf, it seemed  
7 unlikely the plaintiff would timely file a complaint, and consequently she was requesting an  
8 extension of the time to do so. *Id.*

9       Plaintiff met current legal counsel on February 22, 2017, the last day on which she could  
10 timely file her complaint. Dkt. 16 at 4-5; Dkt. 17, p. 2. Two days later, plaintiff’s legal counsel  
11 filed her proposed complaint. Dkt. 1. The record also contains a letter dated February 10, 2017,  
12 from Hannah Hamilton, LMHC, a mental health therapist who has treated Ms. Cromer since  
13 December 2016. In that letter, Ms. Hamilton states that plaintiff has severe symptoms of bipolar  
14 depressive episode and post-traumatic stress disorder have impacted her functioning; these  
15 symptoms include insomnia, fatigue, diminished ability to concentrate, thoughts of death, and  
16 persistent negative beliefs that she is unable to follow up on tasks. Dkt. 17-3. Ms. Hamilton goes  
17 on to state that those symptoms “also cause her to believe that she and the world are unsafe  
18 which makes it difficult to trust the system.” *Id.* Ms. Hamilton asserts that plaintiff “has been  
19 unable to follow-through on a timely request for an appeal due to her PTSD and Bipolar.” *Id.*

20       In addition, the record shows that the ALJ found the plaintiff has severe mental health  
21 impairments including bipolar affective disorder, post-traumatic stress disorder, and borderline  
22 personality disorder. Dkt. 15-1 at pp. 10-11.

23       Defendant does not take issue with the plaintiff’s allegations of fact, nor does the

1 defendant argue that the facts fail to support a determination that plaintiff is entitled to equitable  
2 tolling. The Court finds that in the interests of justice equitable tolling should be applied in this  
3 case. *See generally, Lytle v. McDaniel*, 184 Fed. Appx. 595, 596 (9th Cir. 2006) (finding petition  
4 for habeas corpus under 28 U.S.C. § 2254, filed 56 days beyond the one-year statute of  
5 limitations was subject to equitable tolling, when the petitioner's lawyers withdrew and did not  
6 send the file until a new lawyer was appointed several months later). Plaintiff was forced to  
7 attempt to find new legal counsel two weeks after she received the Appeals Council's notice.  
8 Dkt. 17-2. While she did not start looking for new legal counsel for another ten days, that delay  
9 is consistent with the statements of her therapist about the plaintiff's mental illness causing  
10 impaired ability to follow through. Dkt. 17-1.

11 According to Ms. Hamilton, the plaintiff's severe mental health symptoms caused her to  
12 be unable to "trust the system" and caused her to be unable to follow through on the task of  
13 meeting the deadline for filing a complaint in this matter. Dkt. 17-3. Plaintiff made attempts to  
14 diligently pursue an appeal by making reasonable efforts to obtain counsel, including enlisting  
15 the assistance of her sister; she also submitted a letter and attempted to obtain an extension of  
16 time to file her complaint from the Appeals Council. Dkt. 17-1, 17-2. When plaintiff finally  
17 obtained new legal counsel, the proposed complaint was filed just two days later. Dkt. 1; Dkt. 16;  
18 Dkt.17-2.

19 Defendant has presented no argument as to why these facts do not support a finding that  
20 plaintiff's late filing should be excused. Based on the whole record, the undersigned  
21 recommends that equitable tolling applies and that this Social Security appeal should be deemed  
22 to have been timely filed. Accordingly, defendant's motion to dismiss should be DENIED.

23 The parties have **fourteen (14) days** from service of this Report and Recommendation to  
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1 file written objections thereto. 28 U.S.C. § 636(b)(1); FRCP 72(b); *see also* FRCP 6. Failure to  
2 file objections will result in a waiver of those objections for purposes of appeal. *Thomas v. Arn*,  
3 474 U.S. 140 (1985). Accommodating the above time limit, the Clerk shall set this matter for  
4 consideration on November 24, 2017, as noted in the caption.

5 Dated this 3rd day of November, 2017.  
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Theresa L. Fricke  
United States Magistrate Judge

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